IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 875

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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The Government asserts that this appeal presents no substantial question for review. Yet, it takes issue with each question raised by appellants and favors the district court's departure from the standards for consent decree modification established by this Court in *United States v. Swift & Co.*, 286 U.S. 106 (1932). Like the district court, the Government reads appellants' consent to the decree as effectively barring relief despite this Court's holding that such consent "was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be" (286 U.S. at 115). Similarly, it ignores as the touchstone for relief the disappearance of the reasons for the decree explicitly set forth in its own complaint and in the *Swift* opinion. In their place it sub-

stitutes mere statistical measurements of appellants' size and resources, and it admits that the district court's conclusions as to so-called competitive advantages which appellants would enjoy in the grocery field rest entirely "on the basis of this evidence" (Gov't Motion 8). Finally, the Government suggests that the decree must be continued in force until appellants are suffering "extreme and unexpected" hardship, even though all need for the decree restrictions has disappeared. Thus, the Government's motion underscores the significant errors committed by the district court. We submit that those errors raise substantial issues which are entitled to full review by this Court.

While the Government stresses that this is the third time appellants have sought relief from the pertinent provisions of the decree, it neglects to mention that 30 years have elapsed since the last proceedings. More importantly, it would have the Court ignore, as the Government does, the significance of the sweeping economic changes which have occurred during this long period of time.

1. There is a striking absence in the Government's motion to affirm, as in the opinion below, of any realistic standard for the modification of this decree as well as other antitrust consent decrees. While both acknowledge the principle of modification, they advance a test which would defeat that principle.[1] According to the district court, "this is not a case where equity intervened to correct

[1] The Government places recurrent emphasis (Gov't Motion 4, 14, 15, 17) upon the theme that the decree "totally and permanently barred the appellants from ever again entering these [non-meat] fields" (Gov't Motion 14). But the Government must recognize, despite its innuendo, that the injunction "is 'permanent' only for the temporary period for which it may last. . . . Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted" Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941).

a temporary dislocation or to afford a respite so that competition could be restored. . . . [Appellants] chose to retain size as meat packers rather than to risk further dismemberment, at the price of abandoning the opportunity to extend into other fields" (Op., App. 57). The Government in substance supports this view that appellants, by a settlement, bargained away a right to engage in the grocery business as long as they remain large meat packers. While shrinking from an explicit approval of the court's bargain theory, the Government nevertheless contends that appellants' "consent to a broad prohibition against *any* future participation in certain fields of endeavor had estopped them from arguing that the decree's prohibitions had a narrow objective already accomplished" (Gov't Motion 17).

Appellants do not argue for a "narrow" reading of the decree's objectives. Rather they reason that its objectives were those stated by the Government in its own complaint and by this Court in the *Swift* case, *i.e.*, the protection of competition against explicit dangers then alleged to exist. The district court made no finding that those dangers hold today; indeed, its factual conclusions and the undisputed evidence demonstrate that they do not. To hold that relief is unwarranted under these circumstances is to repudiate the holding of the *Swift* opinion that the proper inquiry is whether "dangers, once substantial, have become attenuated to a shadow" (286 U.S. at 119). In effect, the decision below has declared the immutability of this and other consent decrees, contrary to *Swift* and the more recent holding in *System Fed'n 91, Railway Employes' Dep't v. Wright*, 364 U.S. 642 (1961).

The Government contends that this approach does not conflict with the *System Fed'n 91* case that a bargain of the parties to a consent decree cannot reduce the freedom of

the Court to modify the decree to reflect changed circumstances. The motion says that the district court opinion does not require any greater showing than would be required in the case of a litigated decree (Gov't Motion 18). The district court, however, made directly contrary statements (Juris. State. 28-29). Further, if the Government's argument means that the same impossible standards would be imposed upon modification of litigated antitrust decrees, full review by this Court is all the more important.

So rigid are the tests adopted by the district court and the Government that any consideration of even partial relief is foreclosed. As pointed out in the jurisdictional statement (32-33), the district court's sweeping rationale caused it to refuse any kind of flexible adjustment of the decree. The court even denied the privilege of manufacturing, as distinguished from wholesaling and retailing, without any finding on the subject, and the Government acknowledges this important omission (Gov't Motion 11, note 8).

The Government and the district court, because of their estoppel and bargain theories, have ignored the distinction, so carefully drawn by this Court in the *Swift* case, "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative" (286 U.S. at 114). This crucial misconception is manifested in the district court's erroneous assertion that any modification in this case "would invite the Standard Oil trust, broken up by *Standard Oil Company* v. *United States*, 221 U.S. 1 (1911), now to re-assemble" (Op., App. 57). But obviously the *Standard Oil* case is not in point here; no change in circumstances could make the monopoly there condemned any the less illegal today. By contrast, otherwise lawful business ac-

tivities are denied to appellants by the restraints here in issue. "Provisional and tentative," they have been held immutable although changes wrought by 40 years have eliminated the dangers of anti-competitive abuse which called them into being.

2. The district court held against appellants by completely departing from the 1932 *Swift* decision of this Court as to the reasons for the decree provisions in issue (Juris. State. 21-29). The Government's motion to affirm approves this departure by taking a position which is diametrically opposed to that advanced by it to this Court in 1932.

In 1932, the Government opened its argument to this Court with the statement: "The 1920 decree having been entered without any findings of fact by the court, its purpose must be determined from the allegations of the Government's bill" (Gov't S. Ct. Brief, 1932, 25-26). It went further and stated, that the "principal ground" set forth in the complaint for both paragraphs Third and Fourth of the decree, and the ground upon which the injunction actually rested, was the ability of the defendants to distribute non-meat commodities through their meat distribution facilities with comparatively no increase in overhead, and the use of this advantage temporarily to fix prices so low as to eliminate competition (Gov't S. Ct. Reply Brief, 1932, 1-2, quoted in full, Juris. State. 22, note 9). This position was adopted by the Court, which ruled that there were "two reasons, and only two", for the restraints against engaging in the prohibited food fields and that these were the reasons set forth in the complaint (286 U.S. at 115).[2]

[2] This was the second time this Court held that the complaint in this case is the proper basis for determining the reasons for provisions of the decree. In Swift & Co. v. United States, 276 U.S. 311, 329 (1928), the Court in sustaining the validity of the decree, stated that by their consent, the defendants "left to the court the

In its present motion to affirm, the Government repudiates its former statements to this Court. Dismissing the allegations of its complaint as "narrow specifications of particular past abuses" (Gov't Motion 15-16), the Government now argues, in language squarely contradicting its briefs in 1932: "It is clear . . . that the distribution facilities aspect of the decree was not the sole or primary basis for the prohibition on appellants engaging in the prohibited non-meat activities . . ." (Gov't Motion 14). This radical reversal has been necessitated by its attempt to sustain the district court's continuance of the decree in the face of overwhelming evidence that the dangers explicitly recognized in the complaint and in the *Swift* opinion are nonexistent today. Indeed, the district court expressly found that the distribution advantage could no longer be enjoyed, and it tacitly agreed that the danger of predatory price-cutting had also been removed, for it refrained from any finding adverse to appellants on this question.[3]

To rationalize the result reached below, both the Govern-

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power to construe the pleadings, and, in so doing, to find in them the existence of circumstances of danger which justified" the injunctions.

The Government's motion to affirm exaggerates appellants' position on this issue when it states that appellants assert that "the reason for or purpose of a provision can only be ascertained through examination of the specific claims" of a complaint (Gov't Motion 14-15). Appellants' position is that it is error to ignore such a clear statement of reasons as appears in the instant complaint, especially when this Court has twice held the same complaint to be the proper frame of reference for ascertaining the reasons for the provisions of this decree.

[3] While the text of the Government's motion to affirm takes the position that the absence of the old distribution advantage is immaterial, in a footnote the Government (note 7 at 8-9) expresses disagreement with the district court's finding that the distribution advantage is gone. However, the record references cited by the Government do not support the argument made, as will be shown when an opportunity is presented to brief the question fully for this Court.

ment and the district court argue that the complaint reasons do not satisfactorily account for all of the decree restraints in issue. Further, they contend that this Court's opinion in 1932 did not really hold that those reasons account for all of the paragraphs of the decree barring appellants from the now-prohibited food fields. These arguments do not square with the *Swift* ruling. Thus, contrary to the Government's contention that the Court really devoted its "special attention" only to paragraph Third, which prohibits the use of meat distribution facilities for groceries (Gov't Motion 14), Mr. Justice Cardozo gave "no separate consideration" to this paragraph at all (286 U.S. at 113). Instead, he devoted his attention solely to the broader prohibitions of paragraph Fourth which prohibit all "trading in groceries" (286 U.S. at 115).[4] Similarly, the argument of the Government and of the district court that the enumerated reasons do not explain the injunctions against retailing runs directly counter to the Court's conclusion that the reasons for the restraints against manufacturing and wholesaling apply equally to the prohibition "in respect of sale by retail both for groceries and for meats" (286 U.S. at 117).

The difficulty which the Government and the district court now have is that they are unable to comprehend the significance of the vast changes which have swept through the food field since the 1930's. They cannot project themselves back to a bygone era when control over a nation-wide branch house and car route system could endanger competition at every level of the food industry. As a result, they find the broad prohibitions against manufacturing, wholesaling and retailing more sweeping than at present

[4] Although paragraph Eighth on fresh milk and cream was not then before the Supreme Court, it merely adds one more category of prohibited commodities to those of paragraph Fourth.

seems warranted by the former dangers. Yet, there is no doubt that in 1920 and 1930, the advantages afforded appellants by their far-flung meat distribution systems, adaptable as they then were to groceries with no increase of overhead, were of controlling importance to their entry into the grocery field. Not only is this revealed by the Government's own complaint, but as the Government itself stated in its brief to this Court in 1932 (Gov't S. Ct. Brief, 1932, 27):

> "The Government's bill must also be read in the light of the charges made in the preceding report by the Federal Trade Commission on the meat-packing industry. In its letter to the President transmitting its Summary of this report, the Commission said:
>
> > 'If these five great concerns owned no packing plants and killed no cattle and still retained control of the instruments of transportation, of marketing, and of storage, their position would not be less strong than it is. (65th Cong., 2d Sess., H. R. Doc. 1297, p. 4.)'"

Furthermore, it must be remembered that in 1920 appellants had allegedly eliminated all competition in meat and thus could employ their monopoly power as a lever in the grocery field. While by 1930, their monopoly had been broken, retailers and others remained dependent on them for meat supplies, with the resultant danger of unfair pressures at the retail and wholesale level. Today, however, the complete adequacy of alternative, non-defendant sources for meat is beyond question, and the former danger of tying abuses was laid to rest by the Government stipulation at trial that appellants do not condition the sale of their meats upon the purchase of non-prohibited grocery products.

Clearly, the changes which 40 years have brought to every level of the food industry do not entitle either the district court or the Government to change the ground for the decree provisions to something now more plausible to them in order to prevent modification. They should have no more liberty than the appellants to subject the injunction (in the language of the 1932 *Swift* opinion) to "impeachment in its application to the conditions that existed at its making" (286 U.S. at 119).

The Government's reliance upon this Court's opinions in *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950), and *International Salt Co. v. United States*, 332 U.S. 392 (1947), for the proposition that the complaint can be ignored in determining reasons for a consent decree is misplaced (Gov't Motion 15-16). These opinions do not deal with consent decree modification, but merely sustain the power to issue injunctions which are broader in scope than the precise abuses found. Considered accurately, they aid understanding of how paragraph Fourth of the decree could be, and was, based upon the distribution advantage. For paragraph Fourth is an example of the authority, as stated in the *U. S. Gypsum* case, to "range broadly" through practices connected with illegal acts and to prohibit otherwise lawful activity so as to dissipate a past restraint (340 U.S. at 89).

3. The unprecedented abandonment of the complaint reasons for the decree led the district court, at the urging of the Government, to hold that the decree provisions in question were really bottomed on appellants' large size as meat packers. On this theory, appellants could not have relief as long as they continued to be large meat packers. Since the evidence showed continued substantial

size,[5] it followed automatically that modification was denied, and this principle was applied even as to Cudahy with only 2.4% of the U. S. commercial slaughter.

There is no support in the 1932 *Swift* opinion for the Government's size theory. The Government's argument can be made only by lifting Mr. Justice Cardozo's remarks on size completely out of the context of the dangers of anti-competitive abuse which he held were then existing and which gave relevance to his discussion of size. By contrast, the record in the present case affirmatively shows that those dangers no longer exist and that the appellants' position in the meat industry, under modern economic conditions, gives them no advantage in the sale of groceries. In fact, as pointed out more fully in the jurisdictional statement (11-16), appellants have found it necessary to divorce from their fresh meat operations the manufacture, distribution and sale of the few grocery

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[5] While not of critical importance under the legal principles which appellants contend should be applied to this proceeding, the Government's presentation of certain data on appellants' size cannot be entirely passed without making needed corrections. The motion (6-8) continues the district court's error of aggregating for all appellants certain statistics on slaughter and other matters as if appellants were one firm, contrary to the court's own finding that the old combination was ended long ago (see Juris. State. 27).

Further, the motion states (6-7) that "in 1956 the appellants accounted for nearly 40% of the total commercial slaughter of livestock in the United States (GX 2), with substantial increases since 1920 in every species except cattle (GX 5-A, 5-B, 5-C, 5-D)." However, appellants, even combined, today, account for only approximately 27% of total commercial slaughter (AX 54; CX 43; SX 46). Further, this sentence gives the misleading impression that the *percentage* of total slaughter accounted for by appellants substantially increased since 1920 as to all but one species, whereas the exhibits cited show that the percentages declined in each species but one, calves, with a very drastic decline in the largest species, cattle. Moreover, the Government is silent about the undisputed fact that Cudahy has lost more than one-half of its industry position since the modification proceedings of 1930, Armour more than one-third and Swift more than one-fifth (Juris. State. 18).

items which are permitted to them by the decree. Moreover, their record of performance in these non-meat grocery items clearly shows a lack of any advantage; their market shares in these products have suffered substantial declines (Juris. State. 15).

The only allegedly adverse consequences from appellants' size referred to by the Government in its motion are those contained in three sentences in the district court's 57-page opinion (Op., App. 1-57), which the Government calls two "sets of findings" (Gov't Motion 11). In these, the district court stated that by virtue of their size as meat packers, the appellants would enjoy certain competitive advantages as food retailers and as full-line wholesalers. It did not refer to any evidence in support of these conclusions, nor did it give any other reasons for them. The Government takes no issue with appellants' assertion that these conclusions, upon which the Government relies so heavily, were mere presumptions derived entirely from evidence of appellants' size and resources as meat packers (Juris. State. 27). Indeed, the Government's search of the record has led it to admit that they were reached "on the basis of this evidence" (Gov't Motion 8).

These conclusory observations of the district court are strikingly at variance with the undisputed evidence, and with the specific factual findings which the court did make. For example, the court's observation that if the appellants were free to sell groceries and fresh milk and cream, they would obtain alleged "competitive advantages" from "combined managerial and sales staffs" (Op., App. 55), is contradicted by the immediately preceding findings that appellants' "existing distributive facilities would not afford any substantial advantage in the distribution of groceries along with meats" and that the "permitted grocery items

sold by the defendants are being distributed to an increasing degree independently of meats, through separate units of the business" (Op., App. 55). The assumption that appellants would enjoy any competitive advantages in today's radically changed grocery industry is unsubstantiated, and in fact contradicted, by the court's own findings and by undisputed evidence. Thus, for example, retailing is now dominated by large and efficient supermarkets and is almost completely integrated with wholesaling, modern wholesalers have extended their operations into meats as well as groceries, and large and efficient competitors now exist at every level of the food industry (Juris. State. 11-20).

The Government is in error in asserting that appellants do not directly attack the district court's conclusory inferences (Gov't Motion 11). Their factual validity is directly challenged. In the Questions Presented (Juris. State. 3-4), issue is taken with the district court's conclusion that "appellants' size is synonymous with the danger of competitive abuse," and that the Supreme Court's decision in the *Swift* case, "deprived the court of discretion to modify the decree as long as appellants continue to be large meat packers." The findings and evidence which refute the district court's conclusions are described in the jurisdictional statement (11-20), and will be fully summarized for the Court at the appropriate time.

4. The Government's motion, like the opinion below, also puts in issue the important question of whether modification may properly be granted when the injunctive restraints are no longer needed as a protection to free competition, or whether a court must additionally find extreme and unexpected hardship resulting to the defendant. The issue is of crucial importance not only in this case, but in the judicial supervision of the hundreds of other antitrust consent decrees now in force. Yet the

district court's ambivalent standard that lack of need and hardship are "correlative elements" leaves the issue in great doubt.

The Government seeks to avoid a resolution of this question by this Court by contending that it is unnecessary to this decision. However, the Government is manifestly incorrect in asserting that no question is presented. Determination by this Court that there is no need for the decree provisions will unavoidably confront the Court with the necessity for deciding whether this is legally sufficient for modification.

Secondarily, the Government has advanced the contention that both hardship and lack of need must be shown, since the *Swift* opinion "phrased the issue," according to the Government (Gov't Motion 16), in terms of whether "the restraints of the injunction, however appropriate and just in February, 1920, were now useless and oppressive" (286 U.S. at 113). But the fact is that this language was merely the Court's restatement of the two alternative grounds for relief advanced by the defendants in 1932; it clearly was not an adoption of a conjunctive standard. Indeed, later language in the opinion, as well as sound principles of equity jurisprudence, should have made it clear both to the Government and to the district court that a showing of hardship is uncalled-for when changed circumstances have eliminated all antitrust reasons for the decree. This principle should properly be reaffirmed by this Court.

CONCLUSION

Clearly, substantial and important questions are presented on this appeal. To grant the Government's motion for summary affirmance is to deny the appellants any review at all, despite the obvious importance of this case

and of the issues it raises. As this Court recently observed in *United States v. E. I. du Pont de Nemours and Co.*, 29 U.S.L. Week 4434, 4436 (May 22, 1961):

> "Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, '... it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.' *Hartford-Empire Co. v. United States*, 324 U.S. 570, 571 (1945), clarifying 323 U.S. 386 (1945)."

We submit that the questions tendered by this appeal are clearly substantial and require full review on briefs and oral argument. The motion to affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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